

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA

3  
4 THOMAS M. REDDICK,  
5 Plaintiff,

6 v.

7 CAROLYN W. COLVIN, Acting  
8 Commissioner of Social Security,  
9 Defendant.

Case No.: 16cv00029 BTM(BLM)

**ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT,  
DENYING DEFENDANT'S  
CROSS-MOTION FOR  
SUMMARY JUDGMENT,  
VACATING ALJ'S DECISION,  
AND REMANDING CASE**

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12 In this action, Plaintiff Thomas M. Reddick seeks review of the Commissioner  
13 of Social Security's denial of his application for a period of disability and disability  
14 insurance benefits. Plaintiff and Defendant have filed cross-motions for summary  
15 judgment. For the reasons discussed below, the Court **GRANTS** Plaintiff's motion  
16 for summary judgment, **DENIES** Defendant's motion for summary judgment,  
17 **VACATES** the Commissioner's decision, and **REMANDS** for further proceedings.

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19 **I. PROCEDURAL BACKGROUND**

20 On February 17, 2011, Plaintiff filed a Title II application for a period of  
21 disability and disability insurance benefits, alleging disability beginning July 20,  
22 2010. Plaintiff's claim was denied initially on June 30, 2011, and upon  
23 reconsideration on January 20, 2012.

24 On May 3, 2013, Plaintiff's claim was heard by Administrative Law Judge  
25 Robert Iafe (the "ALJ"). On December 27, 2013, the ALJ issued a decision denying  
26 benefits. Plaintiff filed a request for review with the Appeals Council, which was  
27 denied on June 8, 2015. The ALJ's decision then became the final decision of the  
28 Commissioner of Social Security. Plaintiff seeks judicial review of the

Commissioner's decision pursuant to 42 U.S.C. § 405(g).

## II. ALJ'S FINDINGS AND CONCLUSIONS

The ALJ conducted the five-step sequential analysis set forth in 20 C.F.R. § 404.1520.<sup>1</sup>

At the outset, the ALJ found that Plaintiff met the insured status requirements of the Social Security Act through December 31, 2016. (AR 26.)

The ALJ then found that Plaintiff had not engaged in substantial gainful activity since July 20, 2010, the alleged onset date.

Next, the ALJ found that Plaintiff had the following severe impairments: degenerative disc disease, status post decompression and fusion; spondylosis (arthritis); spondylolisthesis at L5-S1 (described as grade 1) with bilateral foraminal narrowing and impingement; and obesity (20 C.F.R. 404.1520(c)).

The ALJ determined that Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.

At step five, the ALJ found that Plaintiff has the residual functional capacity to: lift and carry 10 pounds frequently and 20 pounds occasionally; stand and walk up to 4 hours out of an 8-hour day for no more than 30 minutes at a time; sit up to

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<sup>1</sup> Under the Social Security Regulations, the determination of whether a claimant is disabled within the meaning of the Social Security Act is a five step process. The five steps are as follows: (1) Is the claimant presently working in any substantially gainful activity? If so, then the claimant is not disabled. If not, then the evaluation proceeds to step two. (2) Is the claimant's impairment severe? If not, then the claimant is not disabled. If so, then the evaluation proceeds to step three. (3) Does the impairment "meet or equal" one of a list of specific impairments set forth in Appendix 1 to Subpart P of Part 404? If so, then the claimant is disabled. If not, then the evaluation proceeds to step four. (4) Is the claimant able to do any work that she has done in the past? If so, then the claimant is not disabled. If not, then the evaluation proceeds to step five. (5) Is the claimant able to do any other work? If not, then the claimant is disabled. If, on the other hand, the Commissioner can establish that there are a significant number of jobs in the national economy that the claimant can do, the claimant is not disabled. 20 C.F.R. § 404.1520. See also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

1 6 hours out of an 8-hour day; occasionally climb stairs and ramps but never climb  
 2 ladders, ropes, or scaffolds; occasionally kneel, crouch, stoop, and bend but not  
 3 on a repetitive basis; avoid crawling, hazards, dangerous machinery, unprotected  
 4 heights, vibrations, extreme cold, and repetitive trunk twisting.

5 Based on the testimony of the vocational expert, the ALJ found that Plaintiff  
 6 is able to perform past relevant work as a financial advisor (DOT No. 250.257-014,  
 7 SVP-8), consultant (DOT No. 189.167-010, SVP-8), marketing (DOT NO. 050.067-  
 8 014, SVP-7), financial manager (DOT No. 186.167-086, SVP-8), and vocational  
 9 instructor (DOT No. 097.221-010, SVP-7).

10 Therefore, the ALJ concluded that Plaintiff has not been disabled, within the  
 11 meaning of the Social Security Act, from July 20, 2010 through the date of the  
 12 decision.

### 13 14 **III. STANDARD**

15 The Commissioner's denial of benefits may be set aside if it is based on legal  
 16 error or is not supported by substantial evidence. Jamerson v. Chater, 112 F.3d  
 17 1064, 1066 (9th Cir. 1997). Substantial evidence is more than a scintilla but less  
 18 than a preponderance. Id. Substantial evidence is "relevant evidence which,  
 19 considering the record as a whole, a reasonable person might accept as adequate  
 20 to support a conclusion." Flaten v. Secretary of Health & Human Servs., 44 F.3d  
 21 1453, 1457 (9th Cir. 1995). A denial of benefits must be upheld if the evidence  
 22 could reasonably support either affirming or reversing the ALJ's decision. Robbins  
 23 v. Social Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

### 24 25 **IV. DISCUSSION**

26 Plaintiff contends that the Commissioner's decision should be reversed and  
 27 that this matter should be remanded for further proceedings because: (1) the ALJ  
 28 impermissibly rejected treating physician Dr. Tung's opinion regarding Plaintiff's

1 residual functional capacity; and (2) the ALJ failed to include mild mental limitations  
2 in his hypothetical to the vocational expert. As discussed below, the Court finds  
3 that Plaintiff's arguments have merit and warrant vacating the ALJ's decision and  
4 remanding this case for further proceedings.

5  
6 A. Rejection of Treating Physician's Opinion

7 Plaintiff argues that the ALJ impermissibly rejected Dr. Tung's opinion that  
8 Plaintiff should be allowed breaks of approximately ten minutes every hour if he is  
9 sitting, and that a situation where he could alternate sitting and standing would  
10 likely be best for him. The Court agrees that the ALJ failed to provide specific and  
11 legitimate reasons, supported by the record, for rejecting Dr. Tung's opinion.

12  
13 1. Dr. Tung's Treatment of Plaintiff and RFC Opinion

14 In October or November of 2008, Plaintiff was referred to Howard Tung,  
15 M.D., who, after imaging Plaintiff's lumbar spine, referred Plaintiff to Dr. Lars  
16 Newsome for epidural steroid injections. (AR 490.). Due to continued back pain,  
17 Plaintiff underwent surgery on February 17, 2010. Dr. Tung performed an L5-S1  
18 decompression, interbody and instrumented fusion. (AR 301.)

19 After the surgery, Plaintiff continued to see Dr. Tung with complaints about  
20 low-back pain. (AR 347, 349, 351, 391, 393.) Plaintiff explained that the pain and  
21 spasms were worse when sitting. (AR 391.)

22 In a Chart Note dated May 12, 2011, Dr. Tung stated that Plaintiff continued  
23 to have chronic symptoms of residual low back pain. (AR 391.) Dr. Tung opined,  
24 "Given that his surgery for L5-S1 spondylolisthesis with spondylolysis is now over  
25 one year ago, Mr. Reddick will likely have chronic residual symptoms." (Id.) Dr.  
26 Tung recommended: "He should avoid prolonged sitting, no greater than six hours  
27 in an eight hour day. He should be allowed breaks of approximately ten minutes  
28 every hour if he is sitting. A situation where he could alternate sitting and standing

1 would likely be best for him.” (Id.)

2  
3 2. ALJ’s Rejection of Dr. Tung’s Opinion

4 Impartial medical expert, Allan Levine, M.D., participated via telephone in the  
5 hearing before the ALJ. He opined that Plaintiff should be able to “sit six hours out  
6 of eight hours with customary breaks.” (AR 71.)

7 The ALJ stated that he assigned “partial weight” to Dr. Tung’s opinion and  
8 gave “great weight” to Dr. Levine’s. (AR 33.) However, with respect to Plaintiff’s  
9 limitations with respect to sitting, the ALJ found that Plaintiff could sit up to 6 hours  
10 out of an 8-hour day. (AR 28.) The ALJ did not find that Plaintiff needed special  
11 breaks when sitting for prolonged periods of time. Therefore, as to Plaintiff’s  
12 limitations regarding sitting, the ALJ essentially rejected Dr. Tung’s opinion and  
13 adopted Dr. Levine’s.

14  
15 3. Failure to Provide Sufficient Reasons

16 As a general matter, opinions of treating physicians are given controlling  
17 weight when supported by medically acceptable diagnostic techniques and when  
18 not inconsistent with other substantial evidence in the record. See 20 C.F.R. §  
19 404.1527(d)(2); SSR 96-2p. Where a treating physician’s opinion is contradicted  
20 by another doctor, the ALJ may not reject the treating physician’s opinion without  
21 providing “specific and legitimate reasons” supported by substantial evidence in  
22 the record. Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1990). In doing so, the  
23 ALJ must do more than proffer his own conclusions – he must set forth his own  
24 interpretations and why they are superior to that of the treating physician’s.  
25 Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). The ALJ may meet this  
26 burden by conducting a detailed and thorough discussion of the facts and  
27 conflicting evidence, and by explaining his interpretations and findings.  
28 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989).

1 The ALJ gave the following explanation for giving great weight to Dr. Levine's  
2 opinion:

3 Dr. Levine had an opportunity to review the claimant's entire medical  
4 record and listen to his sworn testimony. Additionally he was given the  
5 opportunity to question the claimant and was subject to cross  
6 examination by the claimant's counsel. . . . Finally, Dr. Levine is an  
7 impartial expert with a speciality [sic] in orthopedics; therefore, he is  
well qualified to estimate the claimant's limitations from degenerative  
disc disease, obesity and osteoarthritis of the big toes.

8 (AR 33.)

9 The ALJ's articulated reasons for rejecting Dr. Tung's opinion in favor of Dr.  
10 Levine's are not specific and legitimate. The ALJ states that Dr. Levine had the  
11 opportunity to review the claimant's entire record. However, the ALJ does not point  
12 to any specific part of the record reviewed by Dr. Levine and not by Dr. Tung that  
13 supports the rejection of Dr. Tung's opinion. Defendant relies on Garcia v. Astrue,  
14 291 Fed. Appx. 796 (9th Cir. 2008), in which the Ninth Circuit found that substantial  
15 evidence in the record supported the ALJ's rejection of the examining psychiatrist's  
16 report in favor of the testimony of the non-examining psychologist because the  
17 non-examining psychologist had a greater record before him when he testified.  
18 But in Garcia, the additional information available to the non-examining  
19 psychologist included the opinion of another non-treating physician that the  
20 treating physician's report was internally inconsistent. Id. at 798. Here, the ALJ  
21 did not point to any particular document that undermines Dr. Tung's opinion.

22 The fact that Dr. Levine had the chance to participate in the hearing and be  
23 cross-examined by Plaintiff's counsel (who only asked for clarification about Dr.  
24 Levine's opinion regarding Plaintiff's limitations with respect to sitting) is not a valid  
25 reason for adopting Dr. Levine's opinion over that of Dr. Tung, who, according to  
26 the ALJ, "has seen the claimant on a regular basis and is best able to provide a  
27 detailed, longitudinal picture of the claimant's impairment and resulting limitations."  
28



1 (AR 33.) If Dr. Levine's participation in the hearing was in itself a legitimate reason  
2 for adopting his opinion over that of the treating physician, the opinions of treating  
3 physicians could be rejected anytime a non-examining physician testifies at a  
4 hearing before the ALJ.

5 Finally, the ALJ states that Dr. Levine is an impartial orthopedic expert. But,  
6 as pointed out by Plaintiff, Dr. Tung is a neurosurgeon, who specializes in spinal  
7 and brain disorders and who performed Plaintiff's surgery. The Court cannot say  
8 that Dr. Levine's specialized knowledge trumps Dr. Tung's in this case.

9 In sum, the ALJ failed to provide specific and legitimate reasons supported  
10 by the record for rejecting Dr. Tung's opinion that Plaintiff needs to take a ten  
11 minute break during every hour of sitting. The Court, in its discretion, credits Dr.  
12 Tung's opinion as true because Dr. Tung has expertise in spinal disorders,  
13 performed Plaintiff's surgery, and treated Plaintiff for years, and his opinion is well-  
14 supported by the record. See Vasquez v. Astrue, 572 F.3d 586, 594 (9th Cir. 2008)  
15 (explaining that a court has discretion whether to apply the credit-as-true rule, even  
16 if application of the rule would not result in the immediate payment of benefits).  
17 Therefore, the Court remands for further proceedings to determine whether  
18 Plaintiff can perform his past relevant work in light of the limitations found by Dr.  
19 Tung.

20  
21 B. Mild Mental Restrictions

22 Plaintiff makes the additional argument that the ALJ erred in failing to include  
23 his mild mental limitations in the hypothetical posed to the vocational expert ("VE").  
24 Plaintiff is correct—the ALJ was required to include the mild mental limitations in  
25 the hypothetical presented to the VE.

26 The ALJ determined that Plaintiff has mild mental restrictions:

27 With regard to concentration, persistence or pace, the claimant has  
28 mild difficulties. The claimant reported he was unable to "think well"

1 due to side effects of medications (Exhibit 7F/10). He also testified that  
2 his medications made him drowsy and it was difficult to concentrate.

3 (AR 27.)<sup>2</sup> The ALJ found that because Plaintiff's mental impairment caused no  
4 more than "mild" limitation in any of the three functional areas and no episodes of  
5 decompensation, it was non-severe. (*Id.*)

6 However, the ALJ's determination that Plaintiff's mental impairment is not  
7 severe does not mean that the ALJ's finding regarding Plaintiff's mild mental  
8 restrictions is irrelevant to the residual functional capacity assessment. In Hutton  
9 v. Astrue, 491 Fed. Appx. 850 (9th Cir. 2012), the court held that even though the  
10 ALJ found that the plaintiff's PTSD was not severe, for purposes of determining  
11 the plaintiff's residual functional capacity, the ALJ erred in disregarding his own  
12 finding that the plaintiff's PTSD caused some mild limitations in the areas of  
13 concentration, persistence, or pace. *Id.* at 851. See also Kramer v. Astrue, 2013  
14 WL 256790 (C.D. Cal. Jan. 22, 2013) (holding that ALJ erred in failing to include  
15 mild limitations with respect to concentration, persistence, or pace in his  
16 assessment of the plaintiff's residual functional capacity and in the hypothetical he  
17 posed to the VE).

18 On remand, the ALJ must include Plaintiff's mild mental restrictions in  
19 assessing Plaintiff's residual functional capacity and must include these limitations  
20 in any hypothetical posed to the VE.

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23 <sup>2</sup> The record is replete with references to Plaintiff complaining about his medication  
24 adversely affecting his concentration and decision-making abilities. See, e.g., A.R. 393 ("[T]he  
25 medications that he has been utilizing do give him some side effects where he feels that he is  
26 unable to 'think well.'"); AR 393 ("He has been unable to work, as he feels that he is unable to  
27 make 'good decisions' given some of the side effects of his medications . . ."); AR 476 (Plaintiff  
28 indicates that his medications cause drowsiness and lethargy); AR 497 ("He states that . . .  
medications make him 'groggy' and 'fuzzy' and he does not feel he is able to perform his job  
properly under the influence of these medications."); AR 579 (email in which Plaintiff states, "The  
medication helps but the downsides are that it makes me drowsy and lethargic, and I need it to  
sleep.")

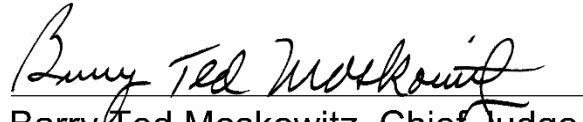


1 **V. CONCLUSION**

2 For the reasons discussed above, Plaintiff's motion for summary judgment  
3 [Doc. 13] is **GRANTED** and Defendant's motion for summary judgment [Doc. 14]  
4 is **DENIED**. The Commissioner's decision is **VACATED** and this matter is  
5 **REMANDED** for further proceedings consistent with this opinion.

6 **IT IS SO ORDERED.**

7 Dated: July 15, 2016

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9 Barry Ted Moskowitz, Chief Judge  
10 United States District Court  
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